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No. 97-2004

In the Supreme Court of the United States

OCTOBER TERM, 1997

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
PETITIONER,

v.

NORMAN LAW, ANDREW GREER, PETER HERRMANN,
MICHAEL JARVIS, JR., CHARLES M. RIEB, DOUG SCHREIBER,
LAZARO COLLAZO, ROBIN DREIZLER AND FRANK CRUZ,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY
SITUATED, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In 1992, the members of the National Collegiate Athletic Association ("NCAA" or "petitioner"), as part of a concerted cost reduction effort, adopted Bylaw 11.02.3 (the "REC rule"), which placed caps of $12,000 for the academic year and $4,000 for the summer on the compensation of the lowest ranking coaches (designated "restricted earnings coaches") in all NCAA Division I sports except Division I-A football. Based upon the "quick look" rule of reason analysis utilized by this Court in *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984) ("*NCAA v. Board of Regents*"), the Tenth Circuit affirmed the district court's interlocutory order granting summary judgment in favor of respondents on the issue of liability.

The question presented is:

Whether the district court and the court of appeals properly applied the "quick look" rule of reason to find that the REC rule—a horizontal agreement among competing employers setting the maximum compensation to be paid to some coaches—violated Section 1 of the Sherman Act, where the NCAA admitted the anticompetitive effects of the rule and failed to offer any substantial procompetitive justifications?

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Respondents Norman Law, Andrew Greer, Peter Herrmann, Michael Jarvis, Jr., and Charles M. Rieb, individually and on behalf of all others similarly situated, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Tenth Circuit's opinion in this case.[1] That opinion (Pet. App. 1a-26a) is reported at 134 F.3d 1010. The underlying district court opinion (Pet. App. 74a-100a) is reported at 902 F. Supp. 1394.

STATEMENT

The court of appeals decision was a straightforward application of well-settled antitrust principles to a horizontal agreement among competing employers to fix their employees' salaries. The decision does not conflict with the rulings of any other court; it does not impede petitioner's legitimate efforts to regulate intercollegiate sports; and it does not present any important issue that warrants resolution by this Court. At bottom, this case involves horizontal price-fixing which, for any other defendant, would be a *per se* violation of the Sherman Act. Solely because it is the NCAA, petitioner avoided *per se* liability and was afforded a full opportunity to justify conduct that is universally condemned without any analysis of competitive effects. In short, petitioner received more, not less, opportunity to defend itself against claims of horizontal price-fixing. Petitioner failed the test, not because the courts below failed to give it adequate opportunity to defend

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[1] Although the petition poses only a single question for review, it purports to seek certiorari with respect to multiple judgments of the Tenth Circuit, including opinions of the court of appeals that neither considered nor decided the issue of substantive antitrust liability recited in the petition. *See* Pet. 1 & n.1, 6 n.2. Only one of the Tenth Circuit's decisions on interlocutory appeals addresses antitrust liability issues (Pet. App. 1a-26a). And the only respondents who were parties to that decision and that judgment were respondents Law, Greer, Herrmann, Jarvis, and Rieb, individually and on behalf of all others similarly situated. *See* Pet. App. 1a, 74a. Although the petition denominates other parties as respondents, (Schrieber, Collazo, Dreizler, Cruz), they are not parties to the only judgment in which the Tenth Circuit resolved substantive antitrust liability issues; they are coaches in sports other than basketball and are parties only to other Tenth Circuit judgments as to which the petition presents no question for this Court's review.

itself, but because its defense, far from justifying the REC rule, actually removed any doubt as to its anticompetitive effect.

Lacking any meritorious basis for this Court's review, the petition misstates the issues decided below, ignores dispositive authorities of this Court and exaggerates the significance of the case. The main point in the petition -- that buyer price fixing should be treated more leniently than seller price-fixing -- was not presented to the district court or to the court of appeals prior to the panel's opinion. As such, it was not addressed or decided by the court of appeals, and is not properly before this Court. In any event, that argument is directly contrary to several decisions of this Court that are not even cited in the petition.

In an attempt to avoid the "price-fixing" label entirely, petitioner misleadingly lumps two separate NCAA bylaws together, defining them jointly as the "REC Rule." Pet. 4. In fact, this case involves only NCAA Bylaw 11.02.3, which caps the salaries of "restricted earnings coaches." It does not involve Bylaw 11.6.4, which limits the number of coaches in each sport.

The petition repeatedly overstates the import of the decision below. Refusing to acknowledge that this case involves only garden-variety price fixing, petitioner claims that the Tenth Circuit's ruling implicates a wide range of NCAA regulations and even "places in grave doubt the future of competitive intercollegiate athletics." Pet. 29. There is simply no basis for the fanciful hyperbole that the future of intercollegiate athletics depends on the ability of NCAA members to collude on the salaries of their lowest paid coaches. Competitive intercollegiate athletics thrived for decades before the adoption of the REC rule in 1992, and has continued to thrive in the three years since the rule was invalidated and rescinded in 1995.

FACTUAL BACKGROUND

NCAA Bylaw 11.02.3 became effective in 1992. It limited the permissible compensation of "restricted earnings coaches"[2] to

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[2] Only the lowest ranking coach in each sport had his or her compensation capped by the rule. The amount of compensation that member institutions

$12,000 and $4,000 for academic year and summer salaries, respectively. The NCAA's "Cost Reduction Committee" formulated and proposed this bylaw to the membership with the officially stated "rationale" of "more effectively limiting compensation to such coaches." Pltff's C.A. App. 123.

The REC rule succeeded in achieving its stated aim of reducing costs by eliminating competition among Division I institutions for the services of "restricted earnings" coaches. Those coaches' "compensation and ability to negotiate with Division I institutions is or has been limited by the [REC] rule." NCAA C.A. App. 24–25, 567–68. "As a result, salaries paid to such coaches . . . have been artificially depressed below the amount those coaches would have received had they been able to negotiate with NCAA Division I institutions individually." *Id. at* 37, 588–89. *See* D. Kan. R. 56.1.

Restricted earnings coaches in men's basketball filed suit in November 1993 in the United States District Court for the Central District of California. In January 1994 the case was transferred on the NCAA's motion to the District of Kansas. After full discovery, the district court granted respondents' motion for summary judgment on liability. It declined to apply the *per se* rule of illegality usually applied to price fixing but, following this Court's analysis in *NCAA v. Board of Regents*, 468 U.S. 85 (1984), held that where the "adverse effects [of a restraint] on competition are apparent, the court does not require proof of market power, and instead moves directly to an analysis of the defendant's proffered competitive justifications for the restraint." Pet. App. 89a. It held that such anticompetitive effects are apparent where, as in this case, "there is an agreement not to compete in terms of price" that is effective in reducing at least some salaries below competitive levels by "specifically prohibit[ing] the free operation of a market responsive to demand." *Id.* at 89a–90a.

On May 25, 1995, the day after the district court's ruling, the NCAA rescinded the REC rule's restrictions on compensation. Shortly thereafter, several NCAA member institutions and confer-

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were allowed to pay their head coaches and other assistant coaches remained unlimited.

ences introduced formal proposals to reinstate, under a new name, limitations on the salaries of coaches whose compensation had been restricted by the REC rule. NCAA C.A. App. 1056–69. With the NCAA poised to vote on those proposals at its 1996 convention, the district court entered an injunction. *Id.* at 1100. The NCAA appealed.[3]

The Tenth Circuit unanimously affirmed. Pet. App. 1a-26a. Like the district court, it rejected application of the *per se* rule,[4] utilizing instead the "quick look rule of reason analysis" of *NCAA v. Board of Regents*. Pet. App. 17a. The Court of Appeals held that "anticompetitive effect is established, even without a determination of the relevant market, where the plaintiff shows that a horizontal agreement to fix prices exists, that the agreement is effective, and that the price set by such an agreement is more favorable to the defendant than otherwise would have resulted from the operation of market forces." *Id.* The court observed that the NCAA had admitted facts that established such an effect in this case:

> "[T]he undisputed evidence supports a finding of anticompetitive effect. The NCAA adopted the REC Rule to reduce the high cost of part-time coaches' salaries, over $60,000 annually in some cases, by limiting compensation to entry-level coaches to $16,000 per year. *The NCAA does not dispute that the cost-reduction has effectively reduced restricted-earnings coaches' salaries. Because the REC Rule was successful in artificially lowering the price of coaching services, no further evidence or analysis is required to find market power to set prices.* Thus, in the case at bar, the district court did not need to resolve issues of fact pertaining to the definition of the relevant market

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[3] The injunction, like the summary judgment ruling, affected only compensation limitations, and had no bearing on numerical limits and other coaching staff regulations.

[4] In the court of appeals' view, "all horizontal agreements among NCAA members, even those as egregious as price-fixing, should be subject to a rule of reason analysis." App. 14a–15a.

> in order to support its decision on summary judgment that the REC Rule is a naked price restraint."

Id. at 18a (emphasis added).

The court of appeals also agreed with the district court that the justifications offered by the NCAA in defense of the REC rule were insufficient as a matter of law. First, the court perceived that the NCAA's argument that the rule would preserve entry-level coaching positions had no bearing on the proper analysis to the extent that argument sought to promote the rule's "social value apart from its effect on competition" (*id.* at 20a); and it observed that in any event "the REC Rule contained no restrictions other than salary designed to insure that the position would be filled by entry-level applicants." *Id.* at 21a. Second, the court of appeals rejected the NCAA's cost-reduction justification, recognizing the inherent incongruity of the notion "that the goal of cost reductions can serve as a legally sufficient justification for a buyers' agreement to fix prices even if such cost reductions are necessary to save inefficient or unsuccessful competitors from failure" (*id.* at 24a). In any event, there was "no evidence that limits on restricted-earnings coaches' salaries would be successful in reducing deficits, let alone that such reductions were necessary to save college basketball." *Id.* Third, the court discerned that the NCAA's purported justification of maintaining competitiveness failed because "[t]he undisputed record reveals that the REC Rule is nothing more than a cost-cutting measure and shows that the only consideration the NCAA gave to competitive balance was simply to structure the rule so as not to exacerbate competitive imbalance." *Id.* at 25a. Finally, the court rejected the NCAA's plea for a "'wait and see' approach to give the rule time to succeed" because to do so would improperly "free the NCAA . . . from its burden of showing that the procompetitive justifications for a restraint on trade outweigh its anticompetitive effects." *Id.* at 26a.

The court of appeals decisively distinguished *Hennessey v. NCAA*, 564 F.2d 1136 (5th Cir. 1977), on numerous grounds, including the dispositive fact that *Hennessey* involved limits on the number, not the salaries, of coaches. Pet. App. 19a. The Tenth Circuit also pointed out that *Hennessey* predated this Court's decision in *NCAA v. Board of Regents*. Moreover, in *Hennessey* the

Fifth Circuit had incorrectly placed on plaintiffs the burden of proving the unreasonableness of the restraint. *Id.* In contrast, many other courts, including this one, correctly place the burden on defendants to demonstrate any procompetitive virtues of horizontal restraints. Pet. App. 19a. It was that burden that the NCAA failed to meet. *Id.* at 20a–25a.

The court of appeals unanimously denied the NCAA's petition for rehearing and suggestion for rehearing en banc. Pet. App. 101a–102a. Petitioner now seeks interlocutory review by this Court of the Tenth Circuit's decision on liability, even while litigation on other issues remains pending in the district court.[5]

REASONS FOR DENYING THE PETITION

The decision below correctly applied well-settled principles to the record in this case. The decision of the Tenth Circuit is in accord with controlling decisions of this Court, does not conflict with other courts of appeals and does not present any issue that warrants further review.

The utter hollowness of the petition is reflected in the fact that its principal argument -- that the antitrust laws distinguish buyer price fixing from seller price fixing -- was never presented below prior to the Tenth Circuit decision. It was offered for the first and only time in the petition for rehearing in the court of appeals and played no role in the decision for which review is sought. That argument, moreover, is contrary to several decisions of this Court, all but one of which the petition omits entirely.

The various purported "conflicts" alleged in the petition are not conflicts at all. Rather, they are the product of petitioner's misstatements of (1) the REC rule, (2) the scope of the Tenth Circuit's decision and (3) the holdings in other cases. Among the petition's more glaring deficiencies is its omission of intervening de-

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[5] At a subsequent trial on damages (which is not before this Court), the jury found that the REC rule had caused "widespread injury" and that some 1,900 coaches had suffered a total of $22.3 million in damages, $11.2 million of which had been suffered by coaches in men's basketball. Post-trial motions are pending.

cisions of this Court with which the Tenth Circuit's ruling is in full accord.

The Tenth Circuit applied well-settled law in holding that, where the anticompetitive effect of a horizontal restraint is both obvious on the face of the restraint and undisputed on the factual record, the burden is on the defendant to justify the restraint in competitive terms. Its conclusion that petitioner failed to do so is specific to the facts of this case and in any event is fully supported by the record.

I. PETITIONER'S PRINCIPAL ARGUMENT WAS NOT RAISED IN THE DISTRICT COURT OR THE COURT OF APPEALS, AND IS NOT PROPERLY BEFORE THIS COURT.

Petitioner's principal argument, that the antitrust laws treat (or should treat) restraints imposed by combinations of competing buyers more leniently than restraints imposed by combinations of competing sellers, was made for the first time in its petition for rehearing in the court of appeals. As such, it was not properly before the court of appeals, *Sierra Club v. Hodel*, 848 F.2d 1068, 1100–01 (10th Cir. 1988) (opinion on rehearing), was not addressed or decided in the Tenth Circuit opinion, and is not properly before this Court. *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981). In any event, it is contrary to settled law and does not warrant review by this Court.

II. THE DECISION BELOW DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR OF ANY OTHER COURT OF APPEALS

A. There Is No Conflict Regarding Application of the Antitrust Laws to Restraints Imposed By Combinations of Buyers as Opposed to Combinations of Sellers

The court of appeals' decision applied well-settled law to a naked horizontal price restraint. Without citing any contrary holding, the petition repeatedly suggests that the decision below

creates a conflict regarding the application of Section 1 of the Sherman Act to combinations of buyers as opposed to sellers. As noted above, this argument was made for the first time in the petition for rehearing and is not properly before this Court. It is also flatly wrong.

This Court has repeatedly held that the Sherman Act applies with equal force to horizontal price fixing by buyers (including employers) and horizontal price fixing by sellers. *Radovich v. National Football League*, 352 U.S. 445, 453–54 (1957) (employers); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 235 (1948) (buyers of sugar beets); *Anderson v. Shipowners Ass'n of the Pacific Coast*, 272 U.S. 359, 364–65 (1926) (employers). This Court recently summarized the governing principle that "antitrust law forbids all agreements among competitors (such as competing *employers*) that unreasonably lessen competition among or between them in virtually any respect whatsoever." *Brown v. Pro Football, Inc.*, 518 U.S. 231, 241 (1996) (emphasis added).

Inexplicably, the petition cites only one of those cases, and ignores all cases that refer specifically to employer combinations. It also fails to cite any of the numerous lower court decisions to the same effect. *E.g.*, *Roman v. Cessna Aircraft Co.*, 55 F.3d 542, 544 (10th Cir. 1995) (employers); *Quinonez v. National Ass'n of Securities Dealers, Inc.*, 540 F.2d 824, 828–29 (5th Cir. 1976) (employers); *International Ass'n of Heat & Frost Insulators v. United Contractors Ass'n*, 483 F.2d 384, 393 (3d Cir. 1973) (employers); *National Macaroni Mfrs. Ass'n v. FTC*, 345 F.2d 421, 426–27 (7th Cir. 1965) (buyers of macaroni ingredients); *Cordova v. Bache & Co.*, 321 F. Supp. 600, 606 (S.D.N.Y. 1970) (employers).[6]

Petitioner suggests that because reduction of costs is the goal of every buyer, the antitrust laws should favor buyer cartels, such

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[6] All the cases cited at Pet. 10 n.3 involved NCAA rules governing athlete eligibility. Such rules usually pass muster under the rule of reason, not because they are input restrictions, but because they are necessary "to preserve the character and quality of the 'product'" of amateur intercollegiate athletics. *NCAA v. Board of Regents*, 468 U.S. at 102. *See infra*, pp. 17-18.

as this one, that relieve buyers of the need to compete in a free market for their necessary inputs, including labor. This would indeed be a drastic new direction for antitrust law. As a commentator quoted by petitioner has written, "the law is clear that conspiracies to restrain competition in an input market are just as much a target of antitrust law as restraints in output markets." Gary R. Roberts, *The NCAA, Antitrust, and Consumer Welfare*, 70 TULANE L. REV. 2631, 2643–44 (1996).

Radovich, one of the pertinent decisions of this Court that petitioner fails to cite, is squarely contrary to petitioner's argument. This omission is particularly telling because it fails to note that *Radovich* quotes the same language from *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940) -- upon which petitioner relies (Pet.16) -- in support of this Court's holding that a complaint challenging an input restraint in the employment market stated a Sherman Act claim. *Radovich*, 352 U.S. at 453-54 n.10.

The petition is flatly wrong when it says (Pet. 15) that there is "considerable academic debate" on this subject. Of the four articles it cites, only one[7] even addresses the argument that employer cartels should be treated more leniently than seller cartels, and that article firmly rejects petitioner's position. Other commentators agree. *E.g.*, Roberts, 70 Tulane L. Rev. at 2643 (power created by buyer cartels is "harmful overall to consumer welfare due to its effect of misallocating society's resources and thus diminishing consumer choice"); 2 Philip E. Areeda & Herbert Hovenkamp, et al., ANTITRUST LAW ¶ 377c (rev. ed. 1995). As Professor Areeda's treatise states:

> Antitrust law addresses employer conspiracies controlling employment terms precisely because they tamper with the employment market and thereby impair the opportunities of those who sell their services there. Just as antitrust law seeks to preserve the free market opportunities of buyers and sellers of goods, so also it seeks to do the same for buyers and sellers of employment services.

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[7] Stephen F. Ross, *The Misunderstood Alliance Between Sports Fans, Players, and the Antitrust Laws*, 1997 U. ILL. L. REV. 519, 527 (1997).

Id.

Petitioner goes so far as to suggest that the REC rule (and by extension any combination of employers to fix employees' wages) serves "the interests of consumers." Pet. 15. Commentators cited by petitioner, however, reject the notion that combinations of employers to restrain wages have any such effect. *See* 2A Philip E. Areeda, et al., ANTITRUST LAW ¶ 574, at 300 (1995); Roberts, 70 TULANE L. REV. at 2643; Ross, 1997 U. ILL. L. REV. at 527. The only "consumers" that would obviously benefit from such combinations are the employers themselves, the "consumers" of labor; and they would benefit in the way any cartel benefits — by insulating themselves from market forces. There is no public interest in allowing such combinations, and certainly none that would justify the abrupt departure from existing law that petitioner asks this Court to take in the absence of any conflict in the lower courts.

B. There Is No Conflict Regarding Application Of The Antitrust Laws To NCAA "Coaching Limitations"

There is no merit to the petitioner's contention that the Tenth Circuit's decision conflicts with the 1977 decisions of the Fifth Circuit in *Hennessey* and the Oklahoma Supreme Court in *Board of Regents of the University of Oklahoma v. NCAA*, 561 P.2d 499 (Okla. 1977) ("*Oklahoma Regents*"). For a host of reasons, no such conflict exists.

In *Hennessey* and *Oklahoma Regents*, the plaintiffs challenged the 1976 rule by which the NCAA first limited the *number* of basketball coaches member institutions could employ. Contrary to petitioner's claim (Pet. 10), no salary limitations were involved, and no effect on salaries was alleged or shown. Indeed, the Fifth Circuit's opinion in *Hennessey* noted specifically that the rule did *not* limit coaches' compensation. 564 F.2d at 1153. In *Oklahoma Regents* the NCAA argued successfully that "there is no basis for concluding that by limiting the *number* of coaches who may be employed that the *salaries* to be paid are thereby reduced." 561 P.2d at 508 (Barnes, J., dissenting, quoting the NCAA's reply brief) (emphasis added).

That argument obviously cannot be made in this case. Unlike the 1976 rule limiting the *number* of coaches, which was not

shown to affect compensation, the REC rule on its face does affect compensation (and the extent of that impact has now been established at the subsequent damages trial that is not before this Court.[8]) Thus the factual premise of the *Hennessey* and *Oklahoma Regents* decisions does not exist in this case.[9]

Those cases, moreover, are more than twenty years old, have not been followed, and have been superseded by subsequent decisions of this Court, including *NCAA v. Board of Regents*. As the court of appeals observed, with the benefit of this Court's analysis in *NCAA v. Board of Regents*, it is likely that the Fifth Circuit would reach a different result if *Hennessey* were decided now. Pet. App. 19a.

There is, in short, no conflict that this Court needs to resolve in the application of the antitrust laws to NCAA coaching restrictions (an exceedingly narrow and party-specific issue that does not warrant review). Any questions about the continued viability of the 1977 decisions of the Fifth Circuit and the Oklahoma Supreme Court either have been answered or are not presented by this case.

C. There Is No Conflict Regarding The Appropriate Application of The "Quick Look" Rule of Reason to Horizontal Price Restraints

In applying the rule of reason to the REC rule, both the district court and the court of appeals followed the road map charted by this Court in *NCAA v. Board of Regents*. Petitioner is correct in saying that anticompetitive effect must be shown, but it is incorrect in suggesting that the Tenth Circuit held otherwise, and in arguing that there was no such showing in this case. Finally, petitioner is incorrect in arguing that the court of appeals should have shown more deference to the NCAA's asserted justifications for

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[8] One of the more bizarre aspects of the petition is its suggestion (Pet. 1, 8) that the REC rule should be absolved of liability *because* it caused substantial injury.

[9] Contrary to the petition (Pet. 10), nothing in *Hennessey* or *Oklahoma Regents* suggests that those decisions turned on a distinction between buyer and seller combinations. To adopt such a distinction in *Hennessey*, the Fifth Circuit would have had to overrule *Quinonez*, 540 F.2d at 828–29, a case it did not even cite.

the REC rule. Nothing in the court of appeals' statement of the rule of reason or in its application to the facts of this case warrants review by this Court.

1. The Court of Appeals Followed Well-Settled Law In Holding That It Was Unnecessary To Define A Relevant Market And Measure Market Power Where The Anticompetitive Effect Was Both Admitted And Apparent On The Face Of The Restraint

The court of appeals held that "[a] plaintiff may establish anticompetitive effect indirectly by proving that the defendant possessed the requisite market power within a defined market *or* directly by showing actual anticompetitive effects, such as control over output or price. . . . A naked, effective restraint on market price or volume can establish anticompetitive effect under a truncated rule of reason analysis." Pet. App. 16a (emphasis added). Petitioner does not quarrel with that statement of the "quick look" rule of reason, which is in accord with all the decisions of this Court and the courts of appeals that have addressed the issue. The petition nevertheless argues that the courts below should have required a showing of market power within a defined market.

In *NCAA v. Board of Regents*, this Court rejected the NCAA's virtually identical argument:

> As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output. To the contrary, *when there is an agreement not to compete in terms of price* or output, "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement."

468 U.S. at 109 (emphasis added, citation omitted). The REC rule is of course just such "an agreement not to compete in terms of price."

Proof of market power is not necessary when the anticompetitive effect of a restraint is apparent on its face:

> While the "reasonableness" of a particular alleged restraint often depends on the market power of the par-

> ties involved, because a judgment about market power is the means by which the effects of the conduct on the market place can be assessed, market power is only one test of "reasonableness." And *where the anticompetitive effects of conduct can be ascertained through means short of extensive market analysis, and where no countervailing competitive virtues are evident, a lengthy analysis of market power is not necessary.*

Id. at 110-11 n.42 (emphasis added). *See also FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460 (1986) (holding market definition unnecessary to "the conclusion that the Federation unreasonably restrained trade" by agreeing to refuse requests for X-rays in connection with the processing of insurance claims).

Other courts of appeals have followed the same approach. E.g., *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1367 (3d Cir. 1996); *Chicago Prof. Sports Ltd. Partnership v. NBA*, 961 F. 2d 667, 674 (7th Cir.), *cert. denied*, 506 U.S. 954 (1992); *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1413 (9th Cir.), *cert. denied*, 502 U.S. 994 (1991). As the Tenth Circuit held in this case, "the purpose in antitrust law of market definition . . . is not an end unto itself but rather exists to illuminate a practice's effect on competition. . . . Thus, where a practice has obvious anticompetitive effects—as does price-fixing—there is no need to prove that the defendant possesses market power." App. 17a. Similarly, as Professor Areeda has explained, market power is only "one surrogate for probable anticompetitive effects." Where the anticompetitive effects of the restraint are obvious, as they were in *NCAA v. Board of Regents*, "the defendant's denial of market power is legally irrelevant." 7 Philip E. Areeda, Antitrust Law ¶ 1511, at 433 (1986).[10]

None of the cases cited by petitioner (Pet. 19–20) holds to the contrary. The Ninth Circuit held in *California Dental Association v. FTC*, 128 F.3d 720, 730 (9th Cir. 1997), *petition for cert. filed*,

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[10] Professor Areeda's treatise endorses the decisions below as "correctly" rejecting petitioner's market power argument. Philip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW ¶ 1504, at 396 n. 1 (1998 Supp.).

66 U.S.L.W. 3668 (U.S. Apr. 3, 1998) (No. 97-1625) that the "facially anticompetitive nature" of the restraint justified the finding of market power. In *In re Detroit Auto Dealers Association*, 955 F.2d 457, 470-71 (6th Cir.), *cert. denied*, 506 U.S. 973 (1992) the Sixth Circuit found sufficient "evidence of the power of petitioners in the relevant market" in the fact that they had entered into and successfully implemented an "inherently suspect" agreement to limit their hours of operation. The Eleventh Circuit in *DeLong Equipment Co. v. Washington Mills Abrasive Co.*, 887 F. 2d 1499, 1507 (11th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990), found no violation in a case in which the "restraints [at issue] were nonprice in nature" and the plaintiff had conceded "that it has not alleged and cannot prove the facts required to establish a prima facie rule of reason case." The Second Circuit held in *Capital Imaging Associates, P.C. v. Mohawk Valley Medical Associates*, 996 F. 2d 537, 546 (2d Cir. 1993), that proof of market power is necessary only "where the plaintiff is unable to demonstrate" that the restraint has had "actual detrimental effects" on competition. And the Seventh Circuit in *Banks v. NCAA*, 977 F.2d 1081, 1088 (7th Cir.), *cert. denied*, 508 U.S. 908 (1992), stated that the rule of reason could be satisfied by proof of "anti-competitive effects."

Thus there is no disagreement among the circuits as to the law to be applied in "quick look" rule of reason cases. The plaintiff, in order to place on the defendant the "heavy burden" of justifying an anticompetitive restraint, *NCAA v. Board of Regents*, 468 U.S. at 113, must show *either* that the defendant has market power *or* that the restraint has had actual anticompetitive effects. Petitioner has no quarrel with the Tenth Circuit's recitation of this well-settled standard; its only quarrel is the contention that the Tenth Circuit erred in concluding that actual anticompetitive effects had been shown in this case. That contention is specious,[11] but in any event is confined to the facts of this case and does not warrant review by this Court. *See* S. Ct. R. 10(a).

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[11] The Tenth Circuit's conclusion is fully supported by the record. The REC rule on its face eliminates price competition, and petitioner has admitted that the rule had its intended anticompetitive effect. Pet. App. 18a. *See supra* at 2–3.

2. The Court of Appeals Followed Well-Settled Law In Rejecting The Justifications Offered By The NCAA

There is no basis in the record for petitioner's complaint that the Tenth Circuit "unduly narrowed" its opportunity to justify the REC rule by showing procompetitive benefits. Nor is there any merit to petitioner's claim that the Tenth Circuit's holding conflicts in that regard with decisions of the Seventh and Third Circuits. Those decisions, like the decision below, closely followed the analysis this Court employed in *NCAA v. Board of Regents*. Dealing with concerted action that "on its face constitutes a restraint upon the operation of a free market," these decisions place upon defendant the "heavy burden of establishing an affirmative defense which competitively justifies this apparent deviation from the operations of a free market." *NCAA v. Board of Regents*, 468 U.S. at 113.

In *Chicago Professional Sports*, the Seventh Circuit held that "[u]nless there are sound justifications [for an anticompetitive combination], the court condemns the practice without ado, using the 'quick look' version of the Rule of Reason." 961 F.2d at 674. It noted that "[t]he district court proceeded in this fashion, examining the league's justifications; finding each wanting, the judge enjoined the [restraint] without defining a market." *Id.* In affirming, the Seventh Circuit considered and rejected each of the defendant's proffered justifications. *Id.* at 674–76. In *United States v. Brown University*, 5 F.3d 658, 672-78 (3d Cir. 1993), the Third Circuit followed the same analysis, concluding however that the justifications proffered in that case were sufficient to require the district court to "more fully investigate [them] than it did when it performed the truncated rule of reason analysis." *Id.* at 678. Those courts all applied the rule of reason in the identical fashion that the Tenth Circuit employed in this case (the difference in the outcome in *Brown University* flows from the particular facts of record in that case, not from a difference in the legal standard applied). Pet. App. 20a–26a. Other circuits are in accord. *California Dental Ass'n*, 128 F.3d at 728; *Clorox Co. v. Sterling Winthrop, Inc.* 117 F.3d 50, 59 (2d Cir. 1997).

None of the authority cited by petitioner supports its claim that a defendant need only "articulate" or "assert" some arguably procompetitive justification. Nor can that claim be squared with *NCAA v. Board of Regents*, in which this Court considered "[t]he interest in maintaining a competitive balance that is *asserted* by the NCAA as a justification for [the restraint]," 468 U.S. at 118 (emphasis added), and rejected that "assert[ion]" as unsupported by the factual record. *Id.* at 119–20. That is what the Tenth Circuit did here.

The Tenth Circuit also hewed closely to *NCAA v. Board of Regents* in drawing the line between horizontal restraints that are "essential if the [NCAA's] product is to be available at all" (468 U.S. at 101) -- such as "rules defining the conditions of the contest, the eligibility of participants, or the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture" (*id.* at 117) -- and those that are not. The REC rule's restraints on assistant coaches' compensation, like the television restraints in *NCAA v. Board of Regents*, "do not . . . fit into the same mold" as restraints necessary to the production of college sports. *Id.*

Petitioner did not even argue in the district court that the REC rule was procompetitive. To the contrary, it attempted to justify the rule by pointing to its anticompetitive effect. *See, e.g.*, NCAA C.A. App. 111–12 (explaining that the rule was justified as an attempt to prevent member institutions from "keeping up with the Joneses" by paying competitive salaries). As in *National Society of Professional Engineers v. United States*, 435 U.S. 679, 693 (1978), petitioner's "affirmative defense confirms rather than refutes the anticompetitive purpose and effect of its agreement." This Court "has never accepted [the] argument" that a "restraint on price competition ultimately inures to the public benefit." *Id.* at 693–94.

There is no principled basis for petitioner's central premise that if it is desirable to encourage entry-level coaches it therefore must be lawful to fix their salaries. If that argument had merit, it might as well be argued that the members of the NCAA (or the American Council on Education) may collectively agree to cap the salaries of assistant professors in order to encourage "entry-level"

academicians. Even if -- contrary to rock solid antitrust doctrine -- competition for coaches (or professors) could somehow be regarded as a bad thing, "the elimination of so-called competitive evils in an industry is nō legal justification for price-fixing agreements." *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 349 (1982) (internal brackets and quotation marks omitted).

III. THE DECISION BELOW DEALS ONLY WITH HORIZONTAL PRICE FIXING IN A COMMERCIAL EMPLOYMENT MARKET, AND DOES NOT THREATEN LEGITIMATE NCAA REGULATION OF INTERCOLLEGIATE ATHLETICS

In an attempt to infuse its request for certiorari with artificially inflated significance, petitioner characterizes the issues presented as "exceptionally important" (Pet. 27), and the decision below as threatening "the future of competitive intercollegiate athletics." *Id.* at 29. In fact, the decision below addresses only the indisputably legitimate concern of the antitrust laws, the preservation of competition in our economy. Nothing in the Tenth Circuit opinion makes it more difficult for petitioner to defend legitimate regulation of intercollegiate athletics.

1. Despite petitioner's breathless citation of news media and commentary regarding the case,[12] petitioner continues to enjoy wide latitude in regulating intercollegiate athletics. This case involves only price fixing of employee salaries. It does not involve limitations on the number of coaches. It does not involve athletic scholarships. Pet. 28. It does not involve the number of games schools can play. *Id.* And it has nothing whatever to do with amateurism for student-athletes. The NCAA existed and thrived for nearly 90 years without the REC rule. It has continued to operate since the rule's rescission without noticeable ill effects.

Petitioner may in the future, as it has in the past, be called upon to defend other of its rules against challenges under the anti-

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[12] That the NCAA seeks and attracts a great deal of press attention does not, of course, make the legal issues in this case any more important or difficult. A party's prominence or notoriety should not and does not play any role in this Court's exercise of its discretionary certiorari jurisdiction.

trust laws. Such rules can and should be evaluated on their merits and measured against well established principles of antitrust law, in particular this Court's decision in *NCAA v. Board of Regents*. That case provides a clear road map for the evaluation of petitioner's regulations and was faithfully followed by the court of appeals in this case.

There is no basis, moreover, for the implication that respondents do not value the tradition of intercollegiate athletics or do not appreciate petitioner's role in the preservation and encouragement of that tradition. Pet. 29. Respondents are individuals who have dedicated their careers to coaching student athletes, and who embody the best of the intercollegiate athletic tradition. That petitioner -- an organization whose revenues increased more than five-fold in 10 years[13] -- descends to the level of such baseless aspersions in these circumstances exposes the absence of any serious ground for review.

Contrary to petitioner's argument, this is a simple and straightforward case on the issue of liability. The supposed "drastic fiscal consequences" of the NCAA's price-fixing (Pet. 8) are neither relevant to that issue nor a valid basis for seeking this Court's review. There is no principled argument that the federal courts should refrain from dropping a penalty flag when petitioner has so obviously committed an economic foul, simply for fear of being accused of threatening the future of intercollegiate athletics.

2. It is similarly unavailing for petitioner to assert that this Court should utilize this case to "bring greater clarity and certainty" to "quick look" rule of reason analysis. Pet. 30. Whether or not further elucidation of that subject is appropriate, this interlocutory appeal is not a suitable vehicle for it. The courts below were presented with a naked restraint in the form of an agreement among competitors to fix the price of coaching services. "No antitrust offense is more pernicious than price fixing." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 639 (1992). That the price fixing in this case directly affects people's livelihood certainly makes it no

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[13] Petitioner's annual revenues increased from $51 million in 1987-88 to $270 million in 1997-98. *Money Games Inside the NCAA*, Kansas City Star, Oct. 5, 1997, at A1.

less pernicious. By considering petitioner's proffered justifications for the REC rule, rather than treating it as a *per se* violation of the Sherman Act, the courts below arguably gave it more leeway than it deserved.[14] That factor alone makes this case *sui generis* and an inappropriate vehicle for further development of the "quick look" rule of reason. There is nothing untoward or revolutionary about the manner in which the issue was addressed, and nothing remarkable about the conclusion of the courts below.[15]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[14] Indeed, the record in this case would require this Court first to consider application of the *per se* standard, thereby creating the distinct possibility that the question presented in the petition might never be reached. That consideration weighs heavily against certiorari.

[15] Petitioner's home-grown *amicus* support, far from demonstrating that the decision below has importance beyond the facts of this case, actually shows the opposite. Only intercollegiate athletic conferences and the American Council on Education, which are composed largely if not entirely of NCAA members (the colluding employers in this case) have expressed an interest.